Interim remedies in shareholder disputes in the Cayman Islands

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The Cayman Islands legal framework includes a number of robust remedies for oppressed minority shareholders. The most common of these remedies is the presentation of a winding up petition on just and equitable grounds, which is similar to the "unfair prejudice" action in other common law jurisdictions including England and Wales and Australia. The relief available to minority shareholders in such actions is not limited to a winding up order and appointment of official liquidators, but may also include alternative relief such as a buy-out order, or orders for the ongoing conduct of the company.

In some instances, where shareholders are concerned about ongoing misconduct by management, there may be a pressing need for the shareholders to take steps to obtain interim relief, because awaiting the outcome of the underlying proceedings may leave the company, or its agents, to take steps which could undermine the utility of any final award. In those instances, urgent action is required to safeguard interests of the minority shareholders.

This article will outline some of the interim remedies available to shareholders in those circumstances. Recent cases have shown that the appointment of provisional liquidators remains a popular and effective tool, although other options are also available and, subject to the circumstances of particular cases, ought to be considered as alternatives.

Appointment of provisional liquidators

After a winding up petition has been presented, but before the Court has made a final order, a petitioner may bring an application to appoint provisional liquidators under section 104(2) of the Cayman Islands Companies Act in order to prevent the dissipation or misuse of company assets, the oppression of minority shareholders, or mismanagement or misconduct on the part of the company's directors. Provisional liquidators, in this context, are appointed to "hold the ring", and to prevent any further steps being taken which may prejudice the company. There has been a significant volume of recent litigation in the Cayman Islands concerning contested

appointments of provisional liquidators.

There are four statutory hurdles for the applicant to overcome before a Court will appoint provisional liquidators:

- A winding up petition must have been presented;
- The applicant must have standing as a registered shareholder of the company;
- The applicant must have a prima facie case for obtaining the winding up order; and
- It must be *necessary* to appoint joint provisional liquidators to achieve one of the statutory purposes set out in section 104(2)(b) of the Companies Act (as set out above, to prevent the dissipation or misuse of the company's assets, to prevent the oppression of minority shareholders, or to prevent mismanagement or misconduct on the part of the company's directors).

The applicant is usually required to provide an undertaking to the Court to pay (a) any damages suffered by the company by reason of the appointment of the provisional liquidators, and (b) the remuneration and expenses of the provisional liquidators in the event that the winding up petition is ultimately withdrawn or dismissed.

The Cayman Court has repeatedly confirmed that the appointment of provisional liquidators is "one of the most intrusive remedies in the court's armoury sometimes referred to as the 'nuclear option" as was the case in *The Matter of Position Mobile Ltd*. As such, there is a heavy evidential burden on applicants and clear and strong evidence of risk of dissipation or misconduct is required in order to persuade the Court that such an order is justified.

Ex parte applications to appoint provisional liquidators are possible in exceptional circumstances (for example if there is an imminent risk of dissipation), however normally at least 4 clear days' notice should be given, as is made clear by the Financial Services Division Guide at C8.1(b). In cases where the Court considers there was no genuine urgency, and "as a matter of tactics" insufficient notices was provided, the Court may dismiss the application and award indemnity costs against the applicant.

Where dissipation of assets is in issue, the dissipation "is not just dissipation in the asset freezing injunction sense of deliberately making away with the assets but also includes any serious risk that the assets may not continue to be available to the relevant entity. The Court will undertake a practical appraisal of the risks, and there must be clear and strong evidence that one of those risks would materialise were provisional liquidators not appointed.

In granting relief on such an application, the Court retains discretion, and will consider factors including the urgency of the application, and whether the final hearing of the petition is

imminent. Otherwise it may take the view that the safest course, and particularly given that it is not possible to make interlocutory findings of fact on disputed issues, is to await the outcome of the final hearing.

However, where the "heavy burden" can be discharged by a shareholder, the appointment of provisional liquidators remains a highly effective tool for oppressed shareholders.

Freezing injunctions

Where a minority shareholder seeks to initiate other proceedings, such as a direct or derivative claim, a freezing injunction may be sought by way of interim relief. To obtain a freezing injunction, the court must be satisfied, consistent with the principles set out in *Broad Idea*, that an applicant has a good arguable case for damages, that there is a real risk of dissipation of assets outside the usual course of business and that it is just and convenient to grant the relief.

It is also possible to obtain statutory injunctive relief in the Cayman Islands in support of foreign proceedings, if they are capable of giving rise to a judgment that is enforceable in the Cayman Islands. The test is substantially the same for obtaining an injunction in domestic proceedings. This is particularly useful in a jurisdiction such as the Cayman Islands, where many of its companies carry on business elsewhere, and so proceedings are often commenced abroad in respect of companies that are located here.

Applications for freezing injunction will often be conducted on an urgent and ex parte basis, because the very reason for the application is that the respondent cannot be trusted not to dissipate the assets. Advance warning of the application would, in those circumstances, only serve to give them a further opportunity to dissipate their assets. However, notice should be given if doing so would not defeat the purpose of the injunction (e.g. if doing so is unlikely to prompt dissipation),and provided any damage the respondent may sustain is capable of being compensated by the cross-undertaking in damages.

As with the appointment of provisional liquidators, the applicant must undertake to the Court to pay any damages that the respondent or any third party notified of the order suffers as a result of the freezing order, if it subsequently transpires that the order should not have been granted.

Where the hearing is conducted on an ex parte basis, there is a very high burden on the applicant to provide full and frank disclosure of all material facts to the Court. This includes not just a full account of the available evidence but also points that may be taken by the respondent in response. The failure to properly discharge the obligation of full and frank disclosure is the most often relied upon ground to discharge ex parte injunctions at the inter partes stage. Injunctions are capable of being discharged without otherwise considering the merits on the basis of non-disclosure.

In *Hudson Capital Solar Infrastructure v Sky Solar Holdings* the applicant was a minority

shareholder seeking to prevent the respondent from carrying out a merger and stopping it from de-listing from the NASDAQ stock exchange. In that case, in addition to seeking freezing relief, the applicant also sought to appoint receivers over a subsidiary entity. Mr Justice Kawaley held that absent solid evidence of a real risk of unjustified dissipation it will not generally be just and convenient to grant intrusive interim relief such as a freezing order or (especially) the appointment of a receiver.

The Cayman Islands Court of Appeal has also recently confirmed the availability of such relief in aid of foreign arbitrations, under section 54 of the Arbitration Act (2012 Revision). In *Minsheng Vocational Education Company Limited v Leed Education Holding Limited & Ors* (Unreported, CICA, 28 March 2024) the Court upheld an injunction granted in aid of a CIETAC arbitration seated in Beijing. This underlined the Court's willingness to support an effective foreign arbitration, even where emergency arbitration is also available.

Inspectorship

While not falling within the category of "interim remedies" another option for shareholders who have credible concerns regarding the management of a company, but lack full information and who do not wish to commence full-blown litigation proceedings, is to seek to appoint inspectors over the company.

Shareholders' rights to information in respect of Cayman Islands companies that do not carry on business in the Cayman Islands, under the Companies Act, are limited. Absent any specific right to information in a shareholders agreement, shareholders are permitted to obtain a copy of the Articles of Association, but otherwise do not have any wider rights to information.

However, if a shareholder has at least one fifth of the issued shares in the company, they can apply to the court and request that it appoints one or more competent inspectors to examine the affairs of the company and to produce a report to the Court. That report is confidential and is not publicly available absent a specific order of the Court to that effect. However, the report of the inspectors is admissible in legal proceedings as evidence of the opinion of the inspectors.

There has been an increase in the number of these applications in the Cayman Islands (there having been three unreported decisions in the past two years). It is important to note that shareholders even with the requisite ownership percentage do not have the right to appoint inspectors as of right. Rather, the Court has a discretion and will usually only appoint inspectors if there is a strong likelihood, well founded on a substantial basis, of some grave conduct, mismanagement or concealment which relate to the management of the company.

Stop notices

Where a shareholder or mortgagee with an equitable interest in the shares of a company has

concerns about the transfer of those shares without notice, they may file an application for a stop notice with the Grand Court of the Cayman Islands, which is then served on the company whose shares have been charged. This notice requires that fourteen days prior written notice be given to the secured party before any dealing with the charged shares may be completed. The issue of a stop notice is a quick and cost effective process which enables a shareholder or mortgagee to take any steps they may consider necessary to protect the assets, should they receive notice of a proposed transfer.

Conclusion

In most cases where interim relief is sought prior to the final hearing, there is a high burden on the applicant to demonstrate that there are justifiable grounds for the Court to restrict the respondent's operations and "hold the ring" pending the outcome of trial, particularly where highly intrusive relief is sought such as appointment of provisional liquidators and receivers. In some cases, where imminent dissipation is not in issue, alternative actions such as the appointment of inspectors, or filing of a stop notice can be considered.

The Ogier disputes team is experienced in obtaining and advising on seeking (or defending) all aspects of urgent interim relief.

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